



## U.S. Copyright Office

### 37 CFR Part 202

[Docket No. 2017-8]

#### Secure Tests

**AGENCY:** U.S. Copyright Office, Library of Congress.

**ACTION:** Interim rule with request for comments.

---

**SUMMARY:** The U.S. Copyright Office is issuing an interim rule amending its regulations governing the registration of copyright claims in secure tests to continue the current rule that was adopted to address the national emergency caused by the COVID-19 pandemic. The Office has decided to continue allowing otherwise-eligible tests that were administered online during the national emergency to qualify as secure tests, provided the test administrator employs sufficient security measures. The Office is also continuing its procedure allowing examination of secure test claims via secure teleconference. Finally, the Office is requesting public comment whether the interim rule should be made permanent and whether it should restrict examinations of secure test claims to virtual examinations.

**DATES:** Effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Comments must be made in writing and must be received by the U.S. Copyright Office no later than [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** For reasons of government efficiency, the Copyright Office is using the *regulations.gov* system for the submission and posting of public comments in this proceeding. All comments are therefore to be submitted electronically through *regulations.gov*. Specific instructions for submitting comments are available on the

Copyright Office website at <https://copyright.gov/rulemaking/securetests>. If electronic submission of comments is not feasible due to lack of access to a computer and/or the internet, please contact the Office using the contact information below for special instructions.

**FOR FURTHER INFORMATION CONTACT:** Suzanne V. Wilson, General Counsel and Associate Register of Copyrights, [svwilson@copyright.gov](mailto:svwilson@copyright.gov); Robert J. Kasunic, Associate Register of Copyrights and Director of Registration Policy and Practice, [rkas@copyright.gov](mailto:rkas@copyright.gov); or David Welkowitz, Attorney Advisor, [dwelkowitz@copyright.gov](mailto:dwelkowitz@copyright.gov). They can be reached by telephone at 202-707-3000.

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

Under Section 408 of the Copyright Act (the “Act”), the U.S. Copyright Office is responsible for registering copyright claims.<sup>1</sup> In so doing, the Office is obligated to obtain registration deposits that are sufficient to verify the claims and to provide an archival record of what was examined and registered.<sup>2</sup> During their term of retention, deposits are available through the Office for public inspection.<sup>3</sup> The Act, however, authorizes the Office to issue regulations establishing “the nature of the copies . . . to be deposited” in specific classes of works and to “permit, for particular classes, the deposit of identifying material instead of copies or phonorecords.”<sup>4</sup>

Pursuant to that authority, the Office has long provided special registration procedures for “secure tests” that require the maintenance of confidentiality. These include tests “used in connection with admission to educational institutions, high school equivalency, placement in or credit for undergraduate and graduate course work,

---

<sup>1</sup> 17 U.S.C. 408.

<sup>2</sup> Id. 408(b), 705(a).

<sup>3</sup> Id. 705.

<sup>4</sup> Id. 408(c)(1).

awarding of scholarships, and professional certification.”<sup>5</sup> Current regulations define a secure test as “a nonmarketed test administered under supervision at specified centers on scheduled dates, all copies of which are accounted for and either destroyed or returned to restricted locked storage or secure electronic storage following each administration.”<sup>6</sup>

Recognizing the confidential nature of secure tests and that the availability of deposits through public inspection could undercut their utility, the Office has had special procedures for examining secure tests since 1978.<sup>7</sup> In June 2017, the Office issued an interim rule (the “June 2017 Interim Rule”) that memorialized certain aspects of its secure test examination procedure and adopted new processes to increase the efficiency of the examination of such works.<sup>8</sup> Under this rule, much of which remains operable today, applicants must, among other things, submit an online application, a redacted copy of the entire test, and a brief questionnaire about the test through the electronic registration system.<sup>9</sup> This procedure allows the Office to prescreen an application to determine whether the work appears to be eligible for registration as a secure test. If the test appears to qualify, the Office will schedule an in-person appointment, or, under the current regulations, a secure videoconference,<sup>10</sup> for examination of an unredacted copy.<sup>11</sup>

Under the June 2017 Interim Rule, the examiner will review the redacted and unredacted copies in a secure location or via secure teleconference in the presence of the

---

<sup>5</sup> 42 FR 59302, 59304 & n.1 (Nov. 16, 1977); *see also* 43 FR 763, 768 (Jan. 4, 1978) (adopting the definition of a secure test).

<sup>6</sup> 37 CFR 202.13(b)(1).

<sup>7</sup> 37 CFR 202.20(b)(4), (c)(2)(vi) (1978); *see* 43 FR at 768-69 (adopting secure test rules).

<sup>8</sup> 82 FR 26850 (June 12, 2017); *see* 37 CFR 202.13, 202.20(b)(3), (c)(2)(vi) (implementing the June 2017 Interim Rule).

<sup>9</sup> 37 CFR 202.13(c)(2).

<sup>10</sup> As discussed below, the Office began using secure videoconferences for examinations in 2021.

<sup>11</sup> *Id.*

applicant or the applicant's representative.<sup>12</sup> If the examiner determines that the relevant legal and formal requirements have been met, he or she will register the claim(s) and add an annotation to the certificate reflecting that the work was examined under the secure test procedure. The regulation provides that the registration is effective as of the date that the Office received in proper form the application, questionnaire, filing fee, and the redacted copy that was uploaded to the electronic registration system, rather than the later date when the in-person examination takes place.<sup>13</sup>

On November 13, 2017, in response to concerns raised by stakeholders following the June 2017 Interim Rule, the Office issued a second interim rule (the "November 2017 Interim Rule") to permit registration of a group of test items (*i.e.*, sets of questions and answers) stored in a database or test bank and used to create secure tests.<sup>14</sup> For these works, the November 2017 Interim Rule adopted most of the same registration procedures that apply to secure tests under the June 2017 Interim Rule.

On March 13, 2020, the President issued a proclamation declaring the COVID-19 outbreak in the United States a national emergency.<sup>15</sup> In response to the COVID-19 national emergency, the Office issued a third interim rule in May 2020 (the "May 2020 Interim Rule"), which amended the definition of secure tests to include those tests administered securely online during the national emergency, rather than in person, under certain conditions: (1) the test must otherwise meet the criteria for secure tests; (2) the test must have been administered at specified centers before the COVID-19 emergency;

---

<sup>12</sup> The applicant must bring to the meeting, among other materials, a signed declaration confirming that the redacted copy brought to the meeting is identical to the redacted copy that was uploaded to the electronic registration system. *Id.* 202.13(c)(3)(iv).

<sup>13</sup> 82 FR at 26853.

<sup>14</sup> 82 FR 52224 (Nov. 13, 2017). *See* 37 CFR 202.4(b), (k), 202.13 (2018) (implementing the November 2017 Interim Rule).

<sup>15</sup> Proclamation No. 9994 of March 13, 2020, 85 FR 15337 (March 18, 2020).

and (3) the administration of the test must be supervised in a manner equivalent to in-person proctoring.<sup>16</sup>

Finally, in February 2021, again in response to the continuing national emergency, the Office issued a fourth interim rule (the “February 2021 Interim Rule”), permitting the examination of secure test copyright applications by secure videoconference.<sup>17</sup>

## **II. Current Interim Rule**

While the Office is continuing to evaluate the secure tests regulations as a whole to determine if changes may be warranted before issuing a final rule, it is issuing an additional interim rule at this time to address the recent end of the declared national COVID-19 emergency. This interim rule is necessary because the May 2020 Interim Rule specifically limited its scope to a test that “is being administered online during the national emergency concerning the COVID–19 pandemic.”<sup>18</sup> On April 10, 2023, the President signed a bill ending the national emergency that had been declared on March 13, 2020.<sup>19</sup>

The Office’s experience with the May 2020 Interim Rule has been positive. That rule provided test administrators who previously administered secure tests at specified centers the flexibility to register these works with the secure test accommodation, even if the tests were administered online during the COVID emergency instead of in person.

---

<sup>16</sup> 85 FR 27296 (May 8, 2020). *See* 37 CFR 202.13(b)(1) (2020) (implementing the May 2020 Interim Rule). The Office also invited comments “on the technological requirements needed for examination of secure test claims via secure teleconference.” The Office received five comments in response. The public comments may be accessed at <https://www.copyright.gov/rulemaking/securetests/>.

<sup>17</sup> 86 FR 10174 (Feb. 19, 2021). *See* 37 CFR 202.13(c)(2) (2021) (implementing the February 2021 Interim Rule).

<sup>18</sup> 37 CFR 202.13(b)(1). The preamble to the May 2020 Interim Rule similarly stated that “the modification of the definition of secure tests is temporary, lasting only until the COVID-19 emergency ends.” 85 FR at 27298.

<sup>19</sup> Pub. L. 118-3 (Apr. 10, 2023). The public health emergency declaration remains in effect until May 11, 2023. *See* <https://www.hhs.gov/about/news/2023/02/09/fact-sheet-covid-19-public-health-emergency-transition-roadmap.html>.

The Office has concluded that these test administrators should have the option to continue to use the secure test accommodation after the end of the declared emergency while the Office evaluates whether, and in what form, to include remotely administered tests permanently in the rule. The Office has not placed a specific time limit on the interim rule because it would like to have sufficient time both to evaluate the use of this rule and to assess how to integrate it into the Office's ongoing modernization of the registration process.

The February 2021 Interim Rule allowing remote examination of secure test claims is not affected by the end of the national COVID-19 emergency. Although that rule was issued in the wake of the pandemic, its language did not limit its use to a time period circumscribed by the pandemic. The Office's experience with the February 2021 Interim Rule has been positive. All secure test applicants have switched to remote examination. This procedure is proving to be more cost effective for applicants and is more efficient for the Office. Therefore, the interim rule does not make any changes to the current process.

The new interim rule maintains a clarifying change related to the storage of secure tests that was implemented in the May 2020 Interim Rule. Prior to that rule, the regulatory language required all copies of a secure test to be "either destroyed or returned to restricted locked storage following each administration."<sup>20</sup> To make clear that this provision does not preclude the retention of digital copies, the May 2020 Interim Rule provided that copies also may be returned to "secure electronic storage." The new interim rule makes no change to that language.

This interim rule should not be seen as determinative of the final rule in this proceeding, which will be established on the basis of the overall rulemaking record. The

---

<sup>20</sup> 37 CFR 202.13(b)(1).

Office recognizes, as it has previously, that the “specified centers” limitation was a concern for many test publishers even before the COVID-19 emergency, with several commenters to prior interim rules urging the Office to amend that language to facilitate a broader range of testing models.<sup>21</sup> The Office therefore will continue to monitor the operation of the interim rule as it evaluates whether and under what conditions remote testing should be permitted under the final rule addressing secure tests.

In light of the end of the national COVID-19 emergency, and its positive experience with current secure test registration rules, the Copyright Office finds good cause to publish these amendments as an interim rule effective immediately, and without first publishing a notice of proposed rulemaking. The rule merely maintains the status quo and the expiration of the national emergency designation could otherwise create uncertainty related to the status of the procedures in the May 2020 Interim Rule.<sup>22</sup>

### **III. Request for Comments**

The Office invites comments regarding the continuation, modification, or possible expansion of the interim rule, particularly as it relates to online testing. The Office also invites comments on the desirability of eliminating in-person examinations and conducting only remote examinations of secure tests.

### **List of Subjects in 37 CFR Part 202**

Claims, Copyright, Registration.

---

<sup>21</sup> In response to the May 2020 Interim Rule, two commenters urged the Office to include remote testing in the definition of secure tests beyond the end of the pandemic. Association of Test Publishers Comments at 2 (June 8, 2020); National College Testing Association Comments at 3-6 (June 8, 2020).

<sup>22</sup> H.R. Rep. No. 1980, 79th Cong., 2d Sess. 26 (1946). See 5 U.S.C. 553(b)(3)(B) (notice and comment is not necessary upon agency determination that it would be “impracticable, unnecessary, or contrary to the public interest”); *id.* at 553(d)(3) (30-day notice not required where agency finds good cause).

For the reasons set forth in the preamble, the Copyright Office amends 37 CFR part 202 as follows:

**PART 202—PREREGISTRATION AND REGISTRATION OF CLAIMS TO COPYRIGHT**

1. The authority citation for part 202 continues to read as follows:

**Authority:** 17 U.S.C. 408(f), 702.

2. Amend § 202.13 by revising paragraph (b)(1) to read as follows:

**§ 202.13 Secure tests.**

\* \* \* \* \*

(b) \* \* \*

(1) A *secure test* is a nonmarketed test administered under supervision at specified centers on scheduled dates, all copies of which are accounted for and either destroyed or returned to restricted locked storage or secure electronic storage following each administration. A test otherwise meeting the requirements of this paragraph shall be considered a secure test if it was normally administered at specified centers prior to May 8, 2020, but is now being administered online, provided the test administrator employs measures to maintain the security and integrity of the test that it reasonably determines to be substantially equivalent to the security and integrity provided by in-person proctors.

\*\*\*\*\*

**Dated:** May 11, 2023

---

**Shira Perlmutter,**  
*Register of Copyrights and*  
*Director of the U.S. Copyright Office.*

Approved by:



---

**Carla D. Hayden,**  
*Librarian of Congress.*

**[BILLING CODE 1410-30-P]**

[FR Doc. 2023-11299 Filed: 5/31/2023 8:45 am; Publication Date: 6/1/2023]